

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CAL-AGREX, Inc., a California Corporation,)	No. C-07-0964 SC
)	
Plaintiff,)	ORDER RE POST-TRIAL
)	<u>MOTIONS</u>
v.)	
)	
DEE VAN TASSELL, JERRY GOODWIN, and)	
DOES 1 through 20, inclusive,)	
)	
Defendants.)	
)	
AND RELATED COUNTERCLAIMS)	
)	

I. INTRODUCTION

The parties tried this matter before a jury, beginning on January 13, 2009, and concluding on January 22, 2009. At the conclusion of the trial, the jury returned a verdict in favor of Plaintiff, Cal-Agrex, Inc. ("Cal-Agrex" or "Plaintiff"), and awarded damages in the amount of \$2,501,595. See Docket No. 207 ("Verdict"). The Court subsequently entered Judgment in accordance with the jury's decision. Docket No. 209. Now before the Court are three motions, each timely filed and fully briefed. In the first motion, Defendants Jerry Goodwin ("Goodwin") and Dee Van Tassell ("Van Tassell," together with Goodwin referred to as "Defendants") move the Court for judgment as a matter of law and for a new trial, pursuant to Federal Rule of Civil Procedure

50(b). See Docket Nos. 210 ("50(b) Mot."), 218 ("50(b) Opp'n"), 223 ("50(b) Reply"). In the second motion, Defendants move for relief from judgment under Federal Rule of Civil Procedure 60(b). See Docket Nos. 211 ("60(b) Mot."), 219 ("60(b) Opp'n"), 225 ("60(b) Reply"). Finally, Plaintiff moves the Court to amend or alter the judgment under Federal Rule of Civil Procedure 59(e) to award pre- and post-judgment interest on the damages award. See Docket Nos. 214 ("59(e) Mot."), 217 ("59(e) Opp'n"), 221 ("59(e) Reply").

Having reviewed the parties' submissions and the record from the trial, the Court DENIES Defendants' Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial, DENIES Defendants' Motion for Relief from the Judgment, and GRANTS IN PART AND DENIES IN PART Plaintiff's Motion to Amend or Alter Judgment to Add Prejudgment and Postjudgment Interest.

II. RULE 50(b) MOTION

In their Rule 50(b) Motion, Defendants assert that because Cal-Agrex never made the contractually-required \$2,000,000 deposit, it was not entitled to recover damages for breach of contract.¹ Therefore, Defendants ask the Court to enter judgment as a matter of law on Cal-Agrex's contract claim, and to reduce the jury's damage award from \$2,501,595.00 to \$507,224, the balance remaining on Cal-Agrex's deposit. Defendants further

¹ The Court assumes the parties' familiarity with the underlying facts and therefore proceeds without a factual summary. Where necessary, citations to the trial transcript and exhibits will be provided.

1 contend that they are entitled to a new trial because the jury's
2 verdict and award of damages are contrary to the weight of the
3 evidence, and because the Court did not instruct the jury on the
4 issue of unclean hands. The Court addresses each of these issues
5 in turn.

6 **A. Legal Standards**

7 1. Judgment as a Matter of Law

8 "Federal Rule of Civil Procedure 50(a) permits a party to
9 move for judgment as a matter of law after the opposing party has
10 been fully heard and prior to the submission of the case to the
11 jury." Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir.
12 2003). Thus, "[i]f a party has been fully heard on an issue
13 during a jury trial and the court finds that a reasonable jury
14 would not have a legally sufficient evidentiary basis to find for
15 the party on that issue, the court may resolve the issue against
16 the party" Fed. R. Civ. P. 50(a). "If the court does not
17 grant a motion for judgment as a matter of law made under Rule
18 50(a), the court is considered to have submitted the action to the
19 jury subject to the court's later deciding the legal questions
20 raised by the motion." Fed. R. Civ. P. 50(b). Under Rule 50(b),
21 the party may renew the motion no later than 10 days after the
22 entry of judgment. Id. The renewed motion "may include an
23 alternative or joint request for a new trial under Rule 59." Id.
24 "A party cannot raise arguments in its post-trial motion for
25 judgment as a matter of law under Rule 50(b) that it did not raise
26 in its pre-verdict Rule 50(a) motion." Id.

27 "Judgment as a matter of law is appropriate when the evidence
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1 presented at trial permits only one reasonable conclusion."
2 Santos v. Gates, 287 F.3d 846 , 851 (9th Cir. 2002). "A jury's
3 verdict must be upheld if it is supported by substantial evidence
4 Substantial evidence is evidence adequate to support the
5 jury's conclusion, even if it is also possible to draw a contrary
6 conclusion from the same evidence." Johnson v. Paradise Valley
7 Unified Sch. Dist., 251 F.3d 1222, 1227 (9th Cir. 2001) (internal
8 citation omitted).

9 2. New Trial

10 Federal Rule of Civil Procedure 59(a)(1)(A) provides that,
11 following a jury trial, a court may grant a motion for a new trial
12 "for any reason for which a new trial has heretofore been granted
13 in an action at law in federal court." Fed. R. Civ. P.
14 59(a)(1)(A). "Rule 59 does not specify the grounds on which a
15 motion for a new trial may be granted." Zheng v. Am. Gem
16 Seafoods, Inc., 339 F.3d 1020, 1035 (9th Cir. 2003). Rather, the
17 Court is "bound by those grounds that have been historically
18 recognized." Id. "Historically recognized grounds include, but
19 are not limited to, claims 'that the verdict is against the weight
20 of the evidence, that the damages are excessive, or that, for
21 other reasons, the trial was not fair to the party moving.'" Molksi v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007)
22 (quoting Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251
23 (1940)). The failure of the Court to correctly instruct the jury
24 on a dispositive issue has also been recognized as grounds for
25 granting a new trial. See Murphy v. City of Long Beach, 914 F.2d
26 183, 186-87 (9th Cir. 1990) (affirming grant of new trial where
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district court omitted instruction on one issue and gave improper instruction on another).

B. Cal-Agrex's Claim for Breach of Contract

Defendants' first challenge addresses the jury's conclusion that Defendants breached a contract with Cal-Agrex. See 50(b) Mot. at 10-15. Specifically, Defendants assert that Cal-Agrex failed to satisfy a condition precedent, thereby releasing Defendants from any obligation to perform their contractual obligations. The Purchase Agreement at issue contains the following provisions relevant to this argument:

COMMODITY: DENATURED (WITH OR WITHOUT ANISE OIL INJECTED) NON-FAT DRY MILK POWDER NOT FOR HUMAN CONSUMPTION. FOR ANIMAL FEED ONLY

QUANTITY: 10,000 METRIC TONS
[...]

PRICE: \$0.45CENTS/LB FOB WAREHOUSE IN UTAH OR IDAHO AT SELLER'S OPTION (EQUIVALENT TO \$992.07/METRIC TON)
[...]

SHIPMENT: 3,000 MT EACH MONTH
JANUARY/FEBRUARY/MARCH 2005,
1,000 MT APRIL 2005
[...]

CONDITIONS:
1) \$2,000,000 (TWO MILLION DOLLARS)
DEPOSIT TO BE WIRED TO THE ACCOUNT
OF DEE VAN TASSELL BETWEEN DECEMBER
22-24, 2004.

Ex. P-107. The parties do not dispute that Cal-Agrex did not make a full deposit of \$2,000,000 on or before December 24, 2004.

1 Through a series of wire transfers, beginning on December 24,
2 2004, and continuing through January 13, 2005, Cal-Agrex deposited
3 a total of \$1,500,000 with Van Tassell. Trial Tr. ("T.T.") vol.
4 1, Jan. 13, 2009, 148:12-149:12; Ex. P-3. "A bedrock principle of
5 California contract law is that 'he who seeks to enforce a
6 contract must show that he has complied with the conditions and
7 agreements of the contract on his part to be performed.'" Brown
8 v. Dillard's, Inc., 430 F.3d 1004, 1010 (9th Cir. 2005) (quoting
9 Pry Corp. of Am. v. Leach, 177 Cal. App. 2d 632, 639 (Ct. App.
10 1960)). Because Cal-Agrex did not comply with the conditions of
11 the Purchase Agreement, Defendants maintain it may not enforce the
12 Purchase Agreement against them.

13 Cal-Agrex asserts, and the jury agreed, that Defendants
14 released Cal-Agrex from the deposit obligation. Specifically,
15 Cal-Agrex asserts that Defendants waived the deposit deadline and
16 orally modified the terms of the Purchase Agreement, such that
17 Cal-Agrex was not required to deposit the remaining \$500,000 until
18 Defendants began shipping the nonfat dry milk ("NDM"). Defendants
19 challenge both of these theories. As either waiver or oral
20 modification could have released Cal-Agrex from its December 24
21 deposit requirement under the contract, and the jury's Verdict
22 does not specify one or the other, the Court reviews the record
23 for evidence of either.

24 As a threshold matter, the parties dispute whether Defendants
25 properly moved for judgment as a matter of law on the issue of
26 waiver before the matter was submitted to the jury, as required by
27 Rule 50(a). Where a party fails to move for judgment as a matter
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1 of law at the close of evidence, the party's subsequent motion to
2 set aside the jury verdict under Rule 50(b) has no legal effect.
3 See Collins v. City of San Diego, 841 F.2d 337, 342 (9th Cir.
4 1988); see also Fed. R. Civ. P. 50(b) Advisory Committee Notes to
5 2006 Amendment ("Because the Rule 50(b) motion is only a renewal
6 of the preverdict motion, it can be granted only on grounds
7 advanced in the preverdict motion."). At the conclusion of trial,
8 the parties and the Court engaged in extensive discussion of
9 Defendants' motion for judgment on the issue of modification. See
10 T.T. vol. 5, Jan. 20, 2009, 1152:5-1162:24. During that
11 discussion, the Court explicitly asked Defendants' counsel whether
12 his arguments applied to waiver and counsel said it did not:

13 THE COURT: HOW DOES THAT COME INTO THE
14 WAIVER?

15 MR. BRENNAN: THAT, THE RULE I'VE JUST
16 IDENTIFIED, WOULD ONLY APPLY TO MODIFICATION,
17 YOUR HONOR. SO OUR RULE 50 MOTION WOULD BE TO
18 RULE THAT AS A MATTER OF LAW THERE CAN BE NO
EVIDENCE OR CLAIM SUPPORTING MODIFICATION. WE
DO NOT MAKE THE SAME ARGUMENT REGARDING
WAIVER.

19 Id. at 1154:16-21. Following the close of proceedings that day,
20 Defendants filed their written Motion for Judgment as a Matter of
21 Law on Contract Issues. Docket No. 198. In that motion,
22 Defendants argued that they were entitled to judgment on the
23 breach of contract claim because Cal-Agrex had failed to carry its
24 evidentiary issue on the issue of waiver. Id. at 6-7. The
25 following morning, Defendants' counsel raised the issue of
26 modification again, arguing that there was no evidence to support
27 modification and that the Court should not instruct the jury on
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1 that issue. T.T. vol. 6, Jan. 21, 2009, at 1169:2-1171:17.
2 Defendants did not at that time raise any similar concerns about
3 whether or not to instruct the jury on the issue of waiver. See
4 id. The Court finds that Defendants raised the issue of waiver in
5 their written motion for judgment as a matter of law prior to the
6 case being submitted to the jury. That is sufficient to satisfy
7 Rule 50(b), so the Court turns to the merits of the motion.

8 There is no dispute that Defendants waived the requirement
9 that the full deposit be made by December 24, 2004. See 50(b)
10 Reply at 3. The dispute is whether Defendants waived the
11 requirement that Cal-Agrex deposit the full \$2,000,000 before
12 Defendants began shipping NDM under the contract. Waiver is the
13 intentional relinquishment of a right. See Intel Corp. v.
14 Hartford Accident & Indem. Co., 952 F.2d 1551, 1559 (9th Cir.
15 1991) (court will "find waiver when a party intentionally
16 relinquishes a right, or when that party's acts are so
17 inconsistent with an intent to enforce the right as to induce a
18 reasonable belief that such right has been relinquished"). "Proof
19 of express language is not necessary to show a waiver, but it may
20 be shown by circumstances or a course of declarations, acts, or
21 conduct." Alpern v. Mayfair Mkts., 118 Cal. App. 2d 541, 547 (Ct.
22 App. 1953).

23 Defendants suggest that the only evidence Cal-Agrex offered
24 on the issue of waiver was two letters from Rod Gallegos of Cal-
25 Agrex to Goodwin and Gallegos's testimony regarding the same. See
26 50(b) Mot. at 13; Exs. P-6, P-22. In each letter, Gallegos
27 promised that Cal-Agrex would pay the remainder of the deposit

1 upon shipment from Defendants. See Ex. P-6 ("As you know, we have
2 already paid to Dee \$1,500,000., the balance of \$500,000. we
3 promised to pay as soon as we commence shipping."); Ex. P-22 ("We
4 promised to give this balance of \$500,000. to Dee within two weeks
5 when we start shipping."). However, in the second of these
6 letters, dated December 17, 2005, Gallegos stated, "As it is, Dee
7 was insisting that we give him the balance of \$500,000. down
8 payment from Jan all the way until June when I stop communicating
9 with him." Ex. P-22. When Defendants' counsel asked Gallegos
10 about these letters at trial, however, Gallegos testified that it
11 was "ridiculous" for Van Tassell to request the remaining \$500,000
12 because the parties had already agreed that Cal-Agrex would not
13 send the balance until Defendants began shipping. See T.T. vol.
14 2, Jan. 14, 2009, at 253:20-256:20.

15 Defendants assert that even if Goodwin waived the deposit
16 requirement, Van Tassell did not. Because Van Tassell and Goodwin
17 were both parties to the Purchase Agreement, Defendants argue,
18 neither could waive the other's rights, so Goodwin's purported
19 waiver was ineffective. 50(b) Mot. at 13-14. Van Tassell's
20 testimony does not go as far as Defendants claim. For example,
21 Defendants say Van Tassell testified that he never waived the
22 requirement of a full deposit. 50(b) Reply at 3. The testimony
23 Defendants cite, however, refers to other transactions between Van
24 Tassell and Cal-Agrex, not to the Purchase Agreement at issue
25 here:

26 Q. IN CONNECTION WITH ANY OTHER AGREEMENTS OR
27 ARRANGEMENTS WITH CAL-AGREX, DID YOU EVER
28 WAIVE THE FULL DEPOSIT REQUIREMENT?

1 A. NEVER.

2 Q. WERE YOU EVER ASKED TO WAIVE THE FULL
3 DEPOSIT REQUIREMENT?

4 A. MANY, MANY TIMES.

5 Q. DID YOU AGREE TO THAT?

6 A. I DID NOT.

7 T.T. vol. 3, Jan. 15, 2009, at 611:20-6:12-3 (emphasis added).
8 Moreover, Van Tassell had previously testified that in January
9 2005, when he had received only \$1,500,000 of the deposit from
10 Cal-Agrex, he attempted to purchase NDM to ship under the Purchase
11 Agreement, but was unable to acquire the product, and he then
12 informed Cal-Agrex that shipment would be delayed. Id. at 560:12-
13 564:15. From this conduct, a reasonable jury could conclude that,
14 despite the outstanding balance on the deposit, Van Tassell
15 intended to begin shipping NDM to Cal-Agrex. Moreover, both
16 Goodwin and Van Tassell testified that even though Cal-Agrex had
17 not paid the final \$500,000 of the deposit, they treated the
18 contract as still continuing. T.T. vol. 3 at 453:13-454:6, 590:4-
19 591:9. Despite the fact that both Goodwin and Van Tassell
20 personally guaranteed the return of the deposit in the event of
21 nondelivery of NDM, they did not return the first \$1,500,000 based
22 on Cal-Agrex's failure to pay the remainder. See Ex. P-107.

23 The evidence is conflicting and could support either
24 position, depending on how one views the credibility of the
25 witnesses. A reasonable jury, if it found Gallegos particularly
26 credible, or found Van Tassell and Goodwin less than credible, or
27 both, could find that Defendants had waived the balance of the

1 deposit. In such a situation, the Court cannot substitute its own
2 opinion for that of the jury. See Johnson, 251 F.3d at 1227.
3 Defendants are therefore not entitled to judgment as a matter of
4 law on the issue of waiver.

5 Although not raised by Defendants in their motion, the Court
6 notes another basis on which the jury might reasonably have found
7 that Defendants breached, even in the absence of waiver or
8 modification. The jury received the following instruction on
9 anticipatory breach:

10 A party can breach, or break, a contract
11 before performance is required by clearly and
12 positively indicating, by words or conduct,
that he or she will not or can not meet the
requirements of the contract.

13 If Cal-Agrex proves that it would have been
14 able to fulfill the terms of the contract and
15 that Jerry Goodwin and/or Dee Van Tassell
16 clearly and positively indicated, by words or
conduct, that he would not or could not meet
the contract requirements, then Mr. Goodwin
and/or Mr. Van Tassell breached the contract.

17 Docket No. 206 ("Jury Instructions") No. 11. Defendants did not
18 object to this instruction, or mention it at all, when discussing
19 instructions with the Court. See T.T. vol. 6 at 1169:2-1171:17.
20 As the parties continued to conduct business and initiate new
21 contracts, some at higher prices than the Purchase Agreement at
22 issue here, there is ample evidence that Cal-Agrex "would have
23 been able to fulfill the terms of the contract" by paying an
24 additional \$500,000. See, e.g., Ex. P-97; T.T. vol. 1 at 157:12-
25 159:15, 161:5-10; T.T. vol. 3 at 568:15-570:9. Although there may
26 have been justifications for entering separate contracts, or the
27 goods Cal-Agrex acquired may have been slightly different, there

1 is no dispute that during the period in which the Purchase
2 Agreement was in effect, Cal-Agrex paid Defendants in excess of
3 \$1,000,000. As such, a reasonable jury could find that Cal-Agrex
4 could have fulfilled the deposit requirement, and Goodwin and Van
5 Tassell therefore breached the Purchase Agreement when they
6 finally refused to send NDM in spring 2006.

7 As the Court finds ample support in the record for a jury
8 verdict that Goodwin and Van Tassell breached the contract, either
9 based on waiver or anticipatory breach, the Court need not reach
10 the question of modification. Nor does the Court reach the
11 question of remittur of damages, as Defendants' arguments on that
12 issue are entirely based on the premise that the jury's breach of
13 contract verdict was unfounded. See 50(b) Mot. at 15-16.
14 Defendants' Motion for Judgment as a Matter of Law is therefore
15 DENIED.

16 **C. New Trial**

17 Defendants also ask the Court for a new trial, based on four
18 issues. First, Defendants argue that the jury's breach of
19 contract verdict was against the clear weight of the evidence.
20 Second, Defendants assert that the Court erred by not instructing
21 the jury on the issue of unclean hands. Third, Goodwin demands a
22 new trial on his conversion and unjust enrichment counterclaims
23 because the jury did not reach unjust enrichment. Finally,
24 Defendants argue that the jury's award of damages is not supported
25 by the evidence. The Court addresses each in turn.

26 **1. Breach of Contract**

27 Defendants contend that, even if the record was sufficient to
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1 support the jury's verdict, the overwhelming weight of the
2 evidence goes against that verdict, and the Court should therefore
3 grant a new trial. See 50(b) Mot. at 16-17 (citing Murphy, 914
4 F.2d at 187). Having reviewed the record, the Court disagrees.
5 While there are no doubt certain facts that would favor a defense
6 verdict here, the evidence described above in the context of
7 judgment as a matter of law is sufficient to convince the Court
8 that a new trial is not warranted. See supra Section II.B.
9 Defendants accepted multiple deposit payments from Cal-Agrex after
10 the initial deposit deadline passed, attempted to secure NDM to
11 fulfill the contract before the deposit was complete, never
12 returned the deposit, and never cancelled the contract. Moreover,
13 the evidence overwhelmingly demonstrates that Cal-Agrex was able
14 to pay the additional \$500,000 at all relevant times, and in fact
15 paid Defendants far in excess of that for more expensive NDM. In
16 the Court's view, this evidence suggests that Defendants refused
17 to honor the terms of the disputed Purchase Agreement because they
18 hoped to sell NDM to Cal-Agrex at a higher price on other
19 contracts. Thus the Court concludes that both the evidence and
20 the interests of justice support the jury's verdict, and there is
21 no basis for conducting a new trial on the breach of contract.

22 2. Unclean Hands

23 Defendants assert that the Court's failure to instruct the
24 jury on the issue of unclean hands warrants a new trial. 50(b)
25 Mot. at 17-20. Cal-Agrex contends that this argument is
26 procedurally improper, as Defendants did not preserve the
27 objection during trial, and that such an instruction was
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unnecessary on the merits. The Court agrees with Cal-Agrex in both regards.

The Court considers the procedural question first. Federal Rule of Civil Procedure 51 governs jury instructions. The court "must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered." Fed. R. Civ. P. 51(b)(2). "A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection." Id. 51(c)(1). Finally, a party may assign error to "a failure to give an instruction, if that party properly requested it and -- unless the court rejected the request in a definite ruling on the record -- also properly objected." Id. 51(d)(1)(B).

Defendants claim they preserved their objection. It is clear that Defendants satisfied the first portion of Rule 51(d)(1)(B) by requesting the instruction. See Defs.' Am. Separate Proposed Jury Instructions (With Authorities), Docket No. 196, at 14. They did not, however, state their objections on the record. At the conclusion of the evidence, Plaintiff brought a Rule 50 motion regarding Defendants' unclean hands affirmative defense, and the Court heard arguments from both sides on the issue. See T.T. vol. 5 at 1146:23-1151:7. The Court then took the matter under submission and told the parties it would issue a decision the following morning. Id. at 1151:5-7. Defendants offered to submit additional authorities on the issue, which the Court rejected, stating, "I'll take a look at what I think [the] law is that

1 applies to the case, and that will be it." Id. at 1151:25-1152:2.
2 Defendants assert that, at this point, further objection or
3 argument would have been futile. See McGonigle v. Combs, 968 F.2d
4 810, 823 (9th Cir. 1992) ("Where the district court is aware of a
5 party's concerns with an instruction, and further objection would
6 be unavailing, we will not require a futile formal objection.").

7 The Court disagrees. At this juncture, the Court had not yet
8 informed the parties of its proposed instructions or offered the
9 opportunity to object, as required under Rule 51(b)(2). The
10 following morning, the Court issued proposed instructions and
11 invited objections, stating, "You've each received a packet of my
12 jury instructions. And do you have any comments with reference to
13 those, or any objections? You may place them on the record."
14 T.T. vol. 6 at 1169:2-5. Defendants did not object to the absence
15 of an unclean hands instruction.

16 Defendants' position after the fact, that such an objection
17 would have been futile, is flawed in two ways. First, the Court
18 explicitly invited comment and objection. Second, Defendants
19 continued to pursue other arguments after the Court had
20 definitively ruled upon them. Even though the Court had taken
21 extensive argument on the issue of modification the previous
22 afternoon and taken that issue under submission, as it had with
23 unclean hands, Defendants raised the issue of modification again
24 after receiving the Court's instructions. See T.T. vol. 5 at
25 1152:9-1162:24; T.T. vol. 6. at 1169:6-1171:19. Clearly,
26 Defendants did not view the Court's ruling on modification as
27 definitive, or further discussion of that issue as futile, though
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1 the Court's words in taking the matter under submission were
2 nearly identical. Despite this, after receiving the Court's
3 proposed instructions, Defendants did not place an objection on
4 the record. They therefore failed to preserve that objection.

5 Even had the objection been preserved, however, the Court
6 would find no error. Three conditions must be satisfied for a
7 district court's refusal to give a requested instruction to be
8 considered erroneous: "(1) the requested instruction correctly
9 stated the law, (2) the instruction dealt with an issue properly
10 before the jury, and (3) the failure to give the instruction
11 resulted in prejudicial harm to the requesting party." Goldsmith
12 v. Babgy Elevator Co., 513 F.3d 1261, 1287 (9th Cir. 2008)
13 (internal quotation marks omitted). Defendants assert two
14 possible reasons why the Court might have failed to instruct on
15 unclean hands, each related primarily to the second condition: (1)
16 the Court found that unclean hands is not a defense to a claim for
17 breach of contract; or (2) the Court agreed with Cal-Agrex,
18 incorrectly, that Defendants were required to show prejudice to
19 prove unclean hands, and failed to do so. See 50(b) Mot. at 19.

20 Both of Defendants' assertions are incorrect.² However, the

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22 ² The Court recognizes, as both parties argued in this matter,
23 that unclean hands is available as an affirmative defense to a
24 contract claim under California law. See Camp v. Jeffer, Mangels,
25 Butler & Marmaro, 35 Cal. App. 4th 620, 638 (Ct. App. 1995) ("In
26 California, the doctrine of unclean hands may apply to legal as
27 well as equitable claims . . . and to both tort and contract
28 remedies." (internal citation omitted)). In discussing jury
instructions and Cal-Agrex's Rule 50 motions at trial, the Court
asked the parties about the effect of the unclean hands defense and
its applicability to this case, but did not question the general
availability of the defense in contract claims. See T.T. vol. 5 at
1146:23-1151:7. The legal issue of whether unclean hands is

1 Court need not address them, as Defendants' argument fails at a
2 more fundamental level. The Court did not, as Defendants suggest
3 in both their Rule 50(b) Motion and their Rule 60(b) Motion,
4 "reserve judgment" on the issue of unclean hands, or fail to
5 adjudicate the issue. See 50(b) Mot. at 19 n.13; 60(b) Mot. at 2.
6 Rather, the Court ruled on unclean hands at trial when, after
7 taking Cal-Agrex's motion on the issue under submission, it
8 refused to issue the requested instruction. See T.T. vol. 5 at
9 1151:5-7. Defendants explicitly concede, and in fact assert as
10 the very premise of their Rule 60(b) Motion, that the Court was
11 entitled to rule on the equitable issue without submitting it to
12 the jury.³ See Unilogic, Inc. v. Burroughs Corp., 10 Cal. App.
13 4th 612, 622 (Ct. App. 1992) ("the trial court has discretion
14 whether to submit an equitable defense to the jury"). As such,
15 unclean hands was not an "an issue properly before the jury," and
16 Defendants cannot satisfy the second condition necessary for a
17 showing of error. See Goldsmith, 513 F.3d at 1287.

18 3. Conversion

19 Defendants next argue that the evidence does not support the
20 jury's verdict on Goodwin's conversion counterclaim, and that
21 Goodwin is therefore entitled to a new trial on conversion and
22 unjust enrichment. "Conversion is the wrongful exercise of
23 dominion over the property of another. The elements of a
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25 available as a defense to breach of contract played no role in the
26 Court's decision not to issue Defendants' requested instruction.

27 ³ The Court addresses the merits of the Rule 60(b) Motion
28 below. See infra Section III.

conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." Burlesci v. Petersen, 68 Cal. App. 4th 1062, 1066 (Ct. App. 1998). At trial, Cal-Agrex moved for judgment on this issue, arguing that Goodwin had failed to prove his ownership of, or right to possess, the 28 truckloads of NDM at issue in the counterclaim. The Court denied the motion, finding there was evidence to demonstrate ownership and that the issue should be submitted to the jury. T.T. vol. 5 at 1145:6-16.

Defendants contend that Goodwin had "beneficial ownership" of the 28 truckloads of NDM, and that Cal-Agrex admitted this during trial. The first element of conversion does not require legal title to the property. "It is clear that legal title to property is not a requisite to maintain an action for damages in conversion. To mandate a conversion action 'it is not essential that plaintiff shall be the absolute owner of the property converted but she must show that she was entitled to immediate possession at the time of conversion.'" Hartford Fin. Corp. v. Burns, 96 Cal. App. 3d 591, 598 (Ct. App 1979) (quoting Bastanchury v. Times-Mirror Co., 68 Cal. App. 2d 217, 236 (Ct. App. 1945)) (emphasis in original). The NDM was stored in a warehouse in Hastings, Nebraska, and belonged to Jeff Larson:

Q. AND THERE CAME A TIME WHEN YOU LEARNED THAT CAL-AGREX HAD PICKED UP SOME 28 TRUCKLOADS OF MILK POWDER FROM A NEBRASKA WAREHOUSE WHERE YOU WERE STORING MILK POWDER. IS THAT RIGHT?

A. IT WASN'T A WAREHOUSE WHERE I WAS STORING

1 THE MILK.

2 Q. WHO WAS STORING THE MILK THERE?

3 A. JEFF LARSON

4 T.T. vol. 3 at 491:21-492:1. Goodwin's contention that he had the
5 right to possess this NDM is based on the fact that he had
6 purchased 250 truckloads of NDM from Larson. See 50(b) Reply at
7 8. At trial, Goodwin testified that he purchased the 250
8 truckloads from Larson after receiving \$500,000 from Cal-Agrex for
9 a purchase that fell through in Arizona. See T.T. vol. 3 at
10 497:14-500:4, 537:7-538:17; T.T. vol. 5 at 1131:4-1132:16.
11 Gallegos testified that Cal-Agrex paid Goodwin for the NDM, but
12 that it came from Larson's warehouse, and gave varying testimony
13 on whether Larson or Goodwin owned it. See T.T. vol. 5 at
14 1012:12-24, 1060:24-1061:12, 1069:4-23, 1071:10-25. Gallegos also
15 testified that Cal-Agrex had valid release numbers authorizing it
16 to pick up the 28 truckloads of NDM from Larson. Id. at 1061:13-
17 1063:1. Further compounding the confusion about who owned the 28
18 truckloads of NDM was conflicting testimony about when Goodwin
19 actually paid Larson relative to when Cal-Agrex took it. See T.T.
20 vol. 5 at 1032:12-23. Cal-Agrex contends, and there is evidence
21 in the record, that Goodwin paid Larson on March 3, 2006, which is
22 after Cal-Agrex took the 28 truckloads, as evidenced by a March 2,
23 2006, letter from Gallegos to Goodwin addressing the dispute. See
24 id. at 1133:7-13, Ex. P-24.

25 The record is, at best, unclear about whether or not Goodwin
26 had a right to possess the 28 truckloads of NDM Cal-Agrex took
27 from Larson's Nebraska warehouse. At worst, for Defendants'

1 motion, the evidence suggests that Goodwin bought the NDM from
2 Larson after Cal-Agrex took possession. Either way, the evidence
3 certainly does not support Goodwin's conversion claim so
4 overwhelmingly that the Court should take the extreme measure of
5 setting aside the jury's verdict and granting a new trial.
6 Moreover, because the Court will not set aside the conversion
7 verdict, there is no warrant for a new trial on unjust enrichment,
8 as that is only a means of measuring damages on a finding of
9 conversion.

10 4. Damages

11 Defendants' final argument for a new trial challenges the
12 jury's damages award. The jury awarded Cal-Agrex \$2,501,595 in
13 damages, which is more than \$2,000,000 above Defendants' expert's
14 highest estimate of Cal-Agrex's damages, and approximately
15 \$2,000,000 below Cal-Agrex's expert's lowest calculation of
16 damages. After the matter was submitted to the jury, the jury
17 asked the Court the following question:

18 Should we decide to award damages for breach
19 of contract, are we bound to follow
20 instruction #13 - Loss of Profits as
specifically stated. Or can we come up with a
reasonable calculation based on the evidence.

21 See Docket No. 208. The Court instructed the jury again to follow
22 the original instructions. See T.T. vol. 6 at 1294:9-1296:11.

23 Defendants contend that despite the Court's explicit
24 direction, the jury's award proves that the jury disregarded
25 either the law, as set forth in the Jury Instructions, or the
26 evidence. See 50(b) Mot. at 21. "[T]he jury is not bound to
27 accept the bottom line provided by any particular damages expert,

1 but the jury is bound to follow the law." In re First Alliance
2 Mortgage Co., 471 F.3d 977, 1003 (9th Cir. 2006) (reversing trial
3 court's denial of motion for new trial where jury averaged the
4 estimates offered by two experts). The only basis Defendants
5 offer for their conclusion is the difference between the experts'
6 estimates and the final award. The only authorities Defendants
7 provide are distinguishable. In In re First Alliance, the court
8 initially gave an improper instruction, corrected the instruction,
9 and later agreed that the jury had disregarded the instructions.
10 See id. at 1002-03. In the only other case Defendants cite,
11 Rosario v. Livaditis, 963 F.2d 1013 (7th Cir. 1992), the jury's
12 conclusions were inconsistent, as two claims relied on identical
13 facts but the jury awarded damages on one claim and not the other.
14 Id. at 1021-22. The jury's verdict here contains no similar
15 internal inconsistency, nor do Defendants assert the contrary.
16 Each of Defendants' authorities addresses a specific, identifiable
17 mistake in the jury's award or in the court's instruction. Here,
18 Defendants do not point to a specific, correctable mistake.
19 Rather, they assert that because the jury did not adopt the
20 specific figures from either expert, the award must be incorrect.
21 That is not sufficient.

22 Cal-Agrex points to several factors that may explain the
23 variance between the expert's estimates and the award. During
24 trial, the parties disputed and presented evidence regarding every
25 figure relevant to the calculation of damages. This included the
26 quantity of NDM at issue, the market value of the NDM on different
27 dates and in different locations, and the costs Cal-Agrex incurred

1 in attempting to cover Defendants' breach, among other things.
2 For each of these components of damages, the evidence could
3 support a wide range of figures. For example, in addition to the
4 expert testimony, each of the central percipient witnesses --
5 Gallegos, Van Tassell, and Goodwin -- testified about what the
6 market price for various types of NDM was at different points in
7 time and in different markets, based on their own knowledge and
8 experience. Depending on which of these witnesses the jury found
9 most credible, the award might change. The Court therefore finds
10 this case comparable to DuBarry International, Inc. v. Southwest
11 Forest Industries, Inc., 231 Cal. App. 3d 552 (Ct. App. 1991), on
12 which Cal-Agrex relies. In that case, the jury was presented with
13 substantial evidence related to the damages calculation, including
14 multiple different scenarios for recovery and varying assumptions
15 by the damages experts. See id. at 562-63. On appeal, the court
16 upheld the jury's verdict, despite the fact that the injury "could
17 have been less or substantially more than the amount actually
18 awarded." Id. at 563. As was the case in DuBarry International,
19 the jury here had ample evidence before it and the matter was
20 fully argued. See id. Under these circumstances, the Court
21 cannot conclude that the jury's award was either unreasonable or
22 unsupported by substantial evidence.

23 24 **III. RULE 60(b) MOTION**

25 In their Rule 60(b) Motion, Defendants suggest that the Court
26 reserved judgment on the issue of unclean hands, and should
27 therefore relieve them from judgment because this issue has not

1 been adjudicated. As noted above, the Court did not reserve
2 judgment. See supra Section II.C.2. Nor did the Court fail or
3 forget to adjudicate the question. Id. With the correct
4 procedural posture in mind, the Court considers the substance of
5 Defendants' motion. Defendants ask the Court to relieve them from
6 the Judgment and conduct a hearing on the issue of unclean hands.
7 See 60(b) Mot. At 8.

8 Initially, the Court notes that while Defendants request a
9 hearing regarding their unclean hands defense, they do not suggest
10 why such a hearing is necessary. The parties had the opportunity
11 to present evidence and argument on this issue at trial, and both
12 did so. The record is complete. Defendants do not argue that the
13 Court or Cal-Agrex prevented them from making their case regarding
14 unclean hands. Nor do they give any indication of what argument
15 they might make, or what evidence they might introduce, if given
16 the opportunity. And if such an argument or piece of evidence is
17 absent, Defendants do not attempt to justify their failure or give
18 the Court a reason to overlook that failure. As such, the Court
19 concludes that an additional hearing would be pointless, and
20 proceeds solely on the question of whether or not to set aside the
21 Judgment based on unclean hands.

22 Rule 60(b) sets forth the possible grounds for relief from a
23 final judgment:

24 On motion and just terms, the court may
25 relieve a party or its legal representative
26 from a final judgment, order, or proceeding
27 for the following reasons:

28 (1) mistake, inadvertence, surprise, or
excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Defendants bring their motion based on Rule 60(b)(6), which "untethers the discretion of judges from the constraints of common law remedies and grants broad remedial power to vacate judgments where justice so requires." Shoshone-Bannock Tribes of the Fort Hall Reservation v. Leavitt, 408 F. Supp. 2d 1073, 1080 (D. Or. 2005). However, this discretion is not to be exercised lightly. A party seeking relief from judgment must demonstrate extraordinary circumstances. Straw v. Bowen, 866 F.2d 1167, 1172 (9th Cir. 1989). "[A] party invoking Rule 60(b) must establish a burden or hardship that 'cries out for the unusual remedy' of reopening a final judgment." Dolezal v. Fritch, No. 08-1362, 2008 U.S. Dist. LEXIS 103404, at *9 (D. Ariz. Dec. 12, 2008) (quoting Straw, 866 F.2d at 1172).

Defendants' Rule 60(b) Motion does not describe a particularly unusual hardship or an extraordinary circumstance requiring relief. Although the motion rehashes an unclean hands argument the Court has rejected, Defendants do not add any

1 additional reason for relief, or any authority that a Court's
2 unfavorable ruling on an equitable issue, absent more, is grounds
3 for relief under Rule 60(b)(6). The Court now makes the prior
4 rejection on unclean hands, and the foundation for that rejection,
5 more explicit.

6 "The doctrine of unclean hands does not deny relief to a
7 plaintiff guilty of any past misconduct; only misconduct directly
8 related to the matter in which he seeks relief triggers the
9 defense." Kendall-Jackson Winery, Ltd. v. Super. Ct., 76 Cal.
10 App. 4th 970, 974 (Ct. App. 2000). In this case, it is the latter
11 issue -- the relationship between the alleged misconduct and the
12 claim before the Court -- that is critical.

13 The misconduct that brings the unclean hands
14 doctrine into play must relate directly to the
15 cause at issue. Past improper conduct or
16 prior misconduct that only indirectly affects
17 the problem before the court does not suffice.
The determination of the unclean hands defense
cannot be distorted into a proceeding to try
the general morals of the parties.

18 Id. at 979. Defendants assert that two categories of actions by
19 Cal-Agrex can be considered predicates for the unclean hands
20 defense: "Cal-Agrex acquired the NDM under the Purchase Agreement
21 with the intent to remove the product markings by repackaging the
22 NDM and selling the product into human consumption channels."
23 60(b) Mot. at 4. And, "Cal-Agrex took possession of 28 truckloads
24 of NDM beneficially owned by Goodwin, without Goodwin's
25 permission, by providing inappropriate 'release numbers' to a
26 warehouse in which the NDM was sold." Id. at 5.

1 Neither of these actions relates to the breach of contract
2 claim on which the jury was to rule. It is undisputed that
3 Defendants never shipped any NDM under the Purchase Agreement at
4 issue. As such, Defendants' first basis for unclean hands is
5 fundamentally flawed because Cal-Agrex never "acquired NDM under
6 the Purchase Agreement." Moreover, anything Cal-Agrex did to the
7 NDM it actually received has no bearing on the breach of contract
8 claim that was submitted to the jury.

9 Defendants contend that Cal-Agrex's intent to mislabel the
10 NDM it would have received under the Purchase Agreement is
11 sufficient to trigger the unclean hands defense. See 50(b) Mot.
12 at 19; 60(b) Reply at 3-4. Defendants rely on the proposition
13 that "[e]quity, in administering its remedies, regards not alone
14 the accomplished fact, but also the intent and purpose of the
15 act." Belling v. Croter, 57 Cal. App. 2d. 296, 306 (Ct. App.
16 1943). This line of argument assumes that the intent to mislabel
17 was somehow harmful to Defendants. It is true, as Defendants
18 assert, that they need not show actual harm to prevail on unclean
19 hands. However, the Court, upon consideration of the evidence at
20 trial, finds that Defendants' assertions of injury, or of possible
21 injury, based on the relabeling are post-hoc rationalizations.
22 Goodwin and Van Tassell both recognized that the prices at which
23 they were selling NDM to Cal-Agrex were substantially higher than
24 what either had ever paid, or would pay, for animal feed, absent
25 extremely unusual circumstances. See T.T. vol.2 at 417:3-418:25;
26 T.T. vol. 3 at 458:9-462:23, 501:21-502:9; T.T. vol. 5 at 1109:3-
27 1111:4. They knew that Cal-Agrex was planning to export the NDM,

1 as they met representatives from Cal-Agrex's purchasers in Asia.
2 See T.T. vol. 2 at 419:10-421:4, 427:21-428:21; T.T. vol. 3 at
3 442:4-443:8, 591:24-593:7; T.T. vol. 5 at 1122:2-1124:12.

4 Having observed both Goodwin and Van Tassell on the stand
5 during trial, the Court finds their testimony suggesting they were
6 ignorant of Cal-Agrex's business plans unreliable. Both
7 Defendants were familiar with the market pricing of legitimate
8 cattle feed, and both knew Cal-Agrex was an exporter. Given that
9 information, it would require willful ignorance for either not to
10 recognize exactly what Cal-Agrex was doing. The Court finds it
11 more likely, however, that both Defendants were willing
12 participants in the enterprise and that their suggestion to the
13 contrary now is simply a tactic to avoid liability for their
14 breach of the Purchase Agreement. Therefore, considering that
15 both Defendants went into the Purchase Agreement fully informed,
16 the Court concludes that the equities do not warrant application
17 of unclean hands here. This conclusion is not simply a suggestion
18 that both parties' hands were unclean, as that would not be
19 sufficient to bar the defense. See Belling, 57 Cal. App. 2d at
20 304-5. Nor does it reflect a weighing of the comparative fault or
21 uncleanliness of the parties. See id. Rather, the Court's
22 conclusion is that, because all parties to the Purchase Agreement
23 were aware of what was taking place, Cal-Agrex's conduct was not
24 inequitable with respect to Defendants, and therefore cannot be a
25 basis for relief in the instant motion.

26 Defendants' second predicate action, the alleged conversion,
27 also fails as a basis for asserting unclean hands. Even if
28

1 Cal-Agrex's actions amounted to conversion, which the jury found
2 they did not, those actions are entirely unrelated to the Purchase
3 Agreement at issue. As discussed above in the context of
4 Defendants' Rule 50(b) Motion, the 28 truckloads of NDM at issue
5 in the conversion counterclaim were taken as replacements for an
6 order for 100 truckloads that Goodwin was supposed to supply out
7 of Arizona on a different contract. See supra Section II.C.3.
8 The testimony on this issue was extensive. See T.T. vol. 1 at
9 178:4-179:16; T.T. vol. 2 at 397:25-398:8, 412:16-24, T.T. vol. 3
10 at 439:14-441:3, 497:14-500:4, 537:7-538:17; T.T. vol. 5 at
11 1028:3-12, 1062:1-1063:1, 1131:4-1132:16. Defendants' assertion
12 that the 28 truckloads were related to the Purchase Agreement they
13 breached is simply unwarranted. Given Defendants' argument at
14 trial that there was only one contract at issue in Cal-Agrex's
15 breach claim, an issue Defendants emphasized in order to minimize
16 their damages exposure, their attempt to blur the contracts
17 together here is disingenuous. See T.T. vol. 2 at 213:18-214:21;
18 T.T. vol. 6 at 1264:23-1266:12. The only connection between the
19 Arizona agreement that led to the disputed 28 truckloads and the
20 Purchase Agreement in Cal-Agrex's claim for breach is that on both
21 contracts, Cal-Agrex gave one or both of the Defendants a
22 substantial amount of money and received nothing in return.

23 For all of the foregoing reasons, the Court finds that
24 Defendants' affirmative defense of unclean hands fails. The Court
25 concluded this at trial when ruling on Cal-Agrex's Rule 50 motion,
26 and reaches the same result now. Defendants have not persuaded
27 the Court that there exist any extraordinary circumstances

warranting the abandonment of an otherwise final judgment. The Rule 60(b) Motion is therefore DENIED.

IV. RULE 59(e) MOTION

Cal-Agrex asks the Court to amend the Judgment to include an award of both prejudgment and post-judgment interest on the damages award. See 59(e) Mot. Defendants point out that post-judgment interest accrues automatically by operation of law, but oppose prejudgment interest. See 28 U.S.C. § 1961. The Court therefore addresses only the question of prejudgment interest.

"In diversity actions, state law determines the rate of prejudgment interest, and postjudgment interest is governed by federal law." AT&T Co. v. United Computer Sys., Inc., 98 F.3d 1206, 1209 (9th Cir. 1996). In California, prejudgment interest is governed by Civil Code section 3287, which provides:

(a) Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. . . .

(b) Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed.

Cal. Civ. Code § 3287. Cal-Agrex requests prejudgment interest on the \$900,000 of unreturned deposit dating back to the date of the

1 breach, which was approximately May 16, 2006, and interest on the
2 remainder of the damages award dating back to the filing of the
3 Complaint.⁴

4 The Purchase Agreement explicitly provides for return of the
5 deposit in the event of nondelivery. See Ex. P-107. It is
6 uncontested that Defendants never shipped NDM under that contract
7 and that they kept \$900,000 of the \$1,500,000 deposit. The only
8 question is whether the various offsets applied by the jury after
9 consideration of the evidence were liquidated or unliquidated. If
10 the offsets were unliquidated, Defendants assert that those
11 offsets should preclude application of section 3287(a).

12 The Court agrees with Cal-Agrex that the offsets the jury
13 applied were liquidated and certain. Where the parties contest
14 liability for claims (or offsets), but not the amount of damage at
15 stake, section 3287(a) is still applicable. See Fireman's Fund
16 Ins. Co. v. Allstate Ins. Co., 234 Cal. App. 3d 1154, 1172 (Ct.
17 App. 1991). The jury, after determining that Cal-Agrex suffered
18 damages in the amount of \$2,894,371, made four deductions totaling
19 \$392,776: \$78,707.50 for the balance due to Goodwin on the 28
20 truckloads taken from the Hastings, Nebraska, warehouse to fulfill
21 the Arizona contract; \$196,768.75 due to Goodwin on Cal-Agrex
22 contract #618; \$79,800 in shipping charges due to Goodwin; and a
23 commission of \$37,500 to Goodwin. See Verdict. These sums were

24
25 ⁴ The Court acknowledges that the May 16 date is an
26 approximation, or as Defendants label it, "extrapolation."
27 However, it cannot be disputed that in or about May 2006,
28 Defendants made clear that they would not ship NDM under the
Purchase Agreement. As such, the Court deems this an appropriate
point to being the calculation of interest.

not in dispute, as Gallegos conceded on the stand that Cal-Agrex owed Defendants these exact amounts for each of these items. See T.T. vol. 2 at 228:10-21, 240:2-7, 242:14-24, 243:8-21. The Court therefore concludes that section 3287(a) compels an award of prejudgment interest on the unreturned \$900,000 deposit, dating back to the breach. According to uncontested calculations submitted by Cal-Agrex's damages expert, applying the statutory rate of interest set in California Civil Code section 3289, the interest on this portion of the Judgment should be \$249,041. See Ip Decl. ¶ 3, Ex. B.⁵ The Court will therefore amend the Judgment to reflect that interest.

Whether or not to award interest on the remainder of the damages falls to the Court's discretion under section 3287(b). Cal-Agrex has not offered the Court any particularly compelling reason to make such an award. While Cal-Agrex has been denied use of the funds during the course of the litigation, the case did not drag on for an unreasonable amount of time, and there was no conduct by Defendants which unjustly prolonged the dispute. The Court therefore declines to award prejudgment interest on the remainder of the award.

V. CONCLUSION

The Court has considered all of the parties arguments on the motions submitted. For the reasons set forth above, the Court ORDERS as follows:

⁵ M. Monica Ip, CPA, Cal-Agrex's expert witness, submitted a declaration in support of the Rule 59(e) Motion. Docket No. 216.

1. Defendants' renewed motion for judgment as a matter of law is DENIED.
2. Defendants' motion for a new trial is DENIED.
3. Defendants' motion for relief from the Judgment is DENIED.
4. Cal-Agrex's motion to alter or amend the Judgment is GRANTED IN PART and DENIED IN PART.
5. The Court shall issue an Amended Judgment to reflect the award of prejudgment interest on the unreturned deposit.

IT IS SO ORDERED.

Dated: April 13, 2009



UNITED STATES DISTRICT JUDGE